

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY WARD JACKSON,

Defendant-Appellant.

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UNPUBLISHED

April 10, 2014

No. 310177

Wayne Circuit Court

LC No. 10-013476-FC

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur in the affirmance of defendant's convictions and agree with the majority's analysis except as to the admission of evidence that defendant may have had a sexual relationship with a female adult parishioner several years before his commission of first-degree criminal sexual conduct, MCL 750.520b.

First, the testimony did not fall within MCL 768.27a.<sup>1</sup> Second, the prosecution did not give notice of its intent to introduce this prior bad act testimony as mandated by MRE 404(b)(2). The majority suggests that because this prior bad act testimony was part of the *res gestae* of the case, no notice needed to be provided, yet cites no authority for this proposition. Moreover, MRE 402(b)(2) states that "the prosecution in a criminal case *shall* give reasonable notice in advance of trial," or during trial on a finding of good cause, of the "nature of the evidence" and "the rationale . . . for admitting the evidence." (Emphasis added). This language certainly appears to apply to evidence offered under the rational of *res gestae*. Moreover, the notice requirement of MRE 404(b)(2) does not place any extraordinary burden on the prosecution, comports with fundamental fairness, and, as it is written in mandatory terms, must be enforced. See *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994) ("use of the term 'shall' . . . indicates mandatory rather than discretionary action.") Nevertheless, under the facts of this case, I do not believe this error merits reversal. The testimony in question was brief and general and,

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<sup>1</sup> MCL 768.27a(1) provides in part that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible . . ." The victim in this case was 12 and 13 years of age at the time of the commission of the charged crimes. The prior act involved an adult.

given the extensive inculpatory evidence, it is difficult to see how the possibility that defendant previously had an affair with an adult woman, even if “inappropriate” in some sense, was a serious consideration of the jury, let alone the determinative factor that led them to convict him of the repeated sexual abuse of a 12 to 13-year-old girl. See *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003) (to merit reversal, evidentiary error must be outcome determinative).

/s/ Douglas B. Shapiro